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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

FRANCIS BERNARD AUER, *et al.*,
Petitioners,
v.
DAVID A. ROBBINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organization (hereinafter AFL-CIO), a federation composed of 75 national and international unions representing over 13 million workers, files this brief *amicus curiae* with the consent of the parties as provided for in this Court's rules.

The AFL-CIO has a vital interest in the construction of one of the fundamental labor laws of our country, the Fair Labor Standards Act (hereinafter the FLSA), 29 U.S.C. § 201 *et seq.* The decisions below substantially

expand the categories of workers who are excluded from the protections of the Act in both the public and private sectors. The decisions also substantially increase the difficulty of enforcing the Act. The decisions therefore threaten the viability of the national maximum hour standard Congress created in the FLSA. It is for these reasons that the AFL-CIO seeks to state its views on the question before the Court.

SUMMARY OF THE ARGUMENT

For over 50 years, the salary basis test has been integral to determining whether employees are employed in a "bona fide executive, administrative, or professional capacity" and are thus exempt from the protection of the FLSA. In practice, the salary basis test regulates the scope of the Act's hours standard. The salary basis test is a reasonable test for exclusion from the maximum hours provisions because being paid on a salary basis is a readily identifiable proxy for performing the duties of an exempt employee, because employees who are paid on a salary basis control their own time and are thus not subject to the harms Congress aimed to remedy by discouraging long hours, and because being paid on a salary basis constitutes an adequate trade-off for the absence of statutory protection.

The Court of Appeals erred when it held that the employer in this case carried its burden of proving that the plaintiff-employees were paid on a salary basis because the employer maintained a written policy that rendered the employees "subject to" disciplinary suspension without pay for less than one week for reasons other than violation of safety rules of major significance and because plaintiff employees were "subject to" such suspensions as a practical matter.

The Court of Appeals also erred when it held that the employer could pass through the "window of correction" and thus maintain the exemption for an employee who had

actually been suspended because the employer did not reimburse the employee, did not promise to comply in the future, did not take either of these actions prior to the initiation of litigation, and did not act inadvertently.

ARGUMENT

In this case, the courts below substantially—and, we submit, erroneously—broadened the scope of the principal limitation on the protective sweep of the FLSA. The FLSA does not protect "any employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary)." 29 U.S.C. § 213(a)(1). Since 1940, two years after the FLSA became law, the Department of Labor (hereinafter "DOL") has "defined and delimited" these statutory terms through two tests: a "salary test" and a "duties test." *See* 5 Fed. Reg. 4077 (1940) (sections 541.1(e), .2(a), .3(b)); 29 C.F.R. § 541.1(f), .2(e)(1), .3(e).[1]

To be exempt under these tests, an employee must (1) be paid a minimum salary[2] and (2) perform the duties of a bona fide executive, administrative, or professional employee. In turn, the "salary test" itself has two elements. To be exempt, employees must (1) receive a minimum amount of compensation each week and (2) receive this compensation on a "salary basis" rather than an hourly basis. *See, e.g.*, 29 C.F.R. § 541.1(f). It is the salary

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[1] In 1949, the DOL amended the regulation to specify, in a manner similar to the present 29 C.F.R. § 541.118(a), precisely what it means to be paid on a "salary basis." *See* 14 Fed. Reg. 7730, 7735 (1949). Finally, in 1954, the DOL adopted the test in the form at issue here. *See* 19 Fed.Reg. 4405 (1954).

[2] The only exceptions to this requirement are employees who hold a license or certificate to practice law or medicine and who are actually engaged in the practice of those professions, medical interns and residents, and teachers who need not be paid a minimum salary in order to qualify as exempt professionals. *See* 29 C.F.R. § 541.3(e).

basis element of the salary test that is at issue in this case.[3]

I. THE SALARY BASIS TEST REGULATES THE SCOPE OF THE NATIONAL HOURS STANDARD, THE MAINTENANCE OF WHICH IS A CENTRAL AND INDEPENDENT OBJECTIVE OF THE FLSA.

We begin our analysis by outlining the role of the salary basis test in effectuating the FLSA's statutory scheme.

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[3] The relevant parts of the regulation at issue provide:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.
>
> (1) An employee will not be considered to be "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.
>
> (2) Deductions may be made, however, when the employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.
>
> . . . .
>
> (5) Penalties imposed in good faith for infractions of safety rules of major significance will not affect the employee's salaried status. Safety rules of major significance include only those relating to the prevention of serious danger to the plant, or other employees, such as rules prohibiting smoking in explosive plants, oil refineries, and coal mines.

29 C.F.R. §541.118(a).

First, the salary basis test is, in practice, not relevant to the Act's minimum wage provision, but only to the coverage of the Act's maximum hour provision. This is because to pass the salary test, an employer must pay the employee in question a minimum amount that is intended to be well in excess of the minimum wage and pay the amount on a salary basis. In adopting the salary test, the DOL explained the basis of the minimum pay requirement: "the terminology of § 13(a)(1) implies a status which cannot be attained by those whose pay is close to or below the universal minimum envisaged in the act." DOL, "Executive, Administrative, Professional . . . Outside Salesman" Redefined—Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition 5 (Oct. 24, 1940) (hereinafter the "Stein Report"), JA 26.[4] Because a minimum weekly payment is a prerequisite to exemption, the requirement that the minimum be paid on a salary basis is ordinarily relevant only in overtime cases.

Second, the FLSA's hours standard is not intended to increase workers' compensation, but rather to create a financial incentive for employers to spread available work and reduce the dangers of overwork. Thus the suggestion made by many employers that the salary basis test is defective because it operates to bring workers who earn well in excess of the minimum wage within the protection of the FLSA is misplaced. Payment in excess of the minimum wage by itself does not suggest that a

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[4] When the salary test was first articulated, the minimum salary was $30 per week. Stein Report at 6. At that time, the minimum wage was 40 cents per hour. Stein Report at 19. An employee earning less than the minimum wage would have had to have worked over 75 hours in a week to pass the minimum payment element of the salary test and thus reach the salary basis element. A lack of administrative action has recently caused the minimum salaries to fall in relation to the minimum wage. The DOL attempted to correct this by increasing the minimum salaries to amounts in excess of 40 times the minimum wage, but the proposed regulation was deferred by presidential action. *See* 46 Fed.Reg. 3,013 (1981); 46 Fed.Reg. 11,972 (1981).

worker should be exempt from the FLSA's maximum hours provision. Congress intended to protect a wide range of workers—not only low wage workers—from the harms accompanying long hours. As the DOL explained when it first adopted the salary test in 1940: " 'A ceilng for hours' is just as much an independent objective of the Act as a 'floor for wages,' and surely it is a serious misreading of the Act to assume that Congress meant to discourage long hours of work only where the wages paid were close to the statutory minimum. Living conditions can be improved and work spread even where wages are comparatively high." Stein Report at 8, JA at 32. This Court has thus recognized the dual and independent objectives of the FLSA: "the FLSA was designed . . . to ensure that *each* employee covered by the Act would receive " '[a] fair day's pay for a fair day's work' *and* would be protected from 'the evil of 'overwork' *as well as* 'underpay.' " *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981) (emphasis added).

Finally, workers at all earning levels continue to need the protection of the national hours standard. In fact, American workers have experienced a dramatic increase in the number of hours they work since the 1960s. The country's leading scholar of work time, Juliet B. Schor of Harvard University, and her colleague Laura Leete report that between 1969 and 1989, average annual hours of paid work by the fully employed increased by 138. *See* Laura Leete & Juliet B. Schor, Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969-1989, 33 *Indus.Rel.L.J.* 25, 31 (1994). According to Louis Harris and Associates, the average American worked just over 50 hours per week in 1995 compared to just over 40 in 1973. *See* Humphrey Taylor, The Harris Poll 1995 #68, Table 2 (Nov. 6, 1995). A Joint Economic Committee staff study found that 80% of two-parent families with children worked more hours in 1989 than in 1979. *See* Labor Letter, *The Wall Street Journal*, Jan. 21, 1992, at A1. In April of 1994, average

manufacturing overtime hours were 4.8 per week, higher than they have been at any time since the BLS began collecting the statistics. *See* Juliet B. Schor, Worktime in Contemporary Context: Amending the Fair Labor Standards Act, 70 *Chi.Kent.L.Rev.* 157, 159 (1994) (citing Bureau of Labor Statistics, U.S. Dept. of Labor 41 *Employment and Earnings* 67 (1994)). According to Schor, 45% of American workers now work more than 45 hours a week. Juliet Schor, Decline of Leisure Time in America, 55 Vital Speeches of the Day 748, 749 (1994). And, while there is debate on other points, there is the broadest agreement that the increased work week is a pervasive reality for the well-educated, white-collar workers employers are most likely to misclassify as exempt executive, professional or administrative employees. *See* Mary Coleman & John Pencavel, Changes in Work Hours of Male Employees, 1940-1988, 46 *Ind. & Lab.Rel.Rev.* 262, 262 (1993); Coleman & Pencavel, Trends in Market Work Behavior of Women Since 1940, 46 *Ind. & Lab. Rel.Rev.* 653, 657 (1993).

The effects of the increase in work hours is exacerbated by the fact that household work has not declined to compensate for the increase of paid labor. While the average number of hours of household work done by women did decrease between 1969 and 1987, the decrease was more than offset by an increase in women's paid labor and men's household and paid work. Leete & Schor, Time-Squeeze at 33. The result is that total hours worked per year rose by 161 for women and 139 for men between 1969 and 1987. *Id.*

The increase in work hours has led to precisely the types of harms Congress aimed to eradicate through the creation of a national hours standard. A 1991 Gallup poll found that nearly two-thirds of working parents felt they spent too little time with their children. Larry Hugick & Jennifer Leonard, Gallup Poll, Mirror of America—Role of Work: Job Dissatisfaction Grows;

'Moonlighting' on the Rise, 56 Gallup Poll News Service (Sept. 2, 1991). More than one-third reported "a great deal" or "quite a lot" of conflict between the demands of work and family or personal relationships. *Id.* at 6. When asked which realm "suffers more" from such conflict, 77% responded that family and relationships suffer more. *Id.*

Increased work hours has thus caused a decline in the "general well-being of workers," particularly those on the border of the statutory exemptions. 29 U.S.C. § 202(a). The exemptions to the FLSA, and particularly the salary basis test for exemption, should be "narrowly construed" in order to further the objective embodied in the national hours standard. *Michael v. Kentucky Finance Co.*, 359 U.S 290, 295 (1959).

II. THE SALARY BASIS TEST IS A REASONABLE TEST FOR EXCLUSION FROM THE PROTECTION OF THE FLSA'S MAXIMUM HOUR STANDARD.

During the past 50 years, the DOL has taken extensive testimony and reviewed voluminous comments concerning the salary test and on five occasions has expressly affirmed the test's utility as a means of distinguishing between exempt and nonexempt employees.

The DOL has held three sets of hearings, in 1940, 1949, and 1958, to consider the definitions of the exemptions, and has solicited comments on the definitions, in 1954. *See* Stein Report; DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (June 1949) (hereinafter the "Weiss Report"); DOL, Report and Recommendations on Proposed Revisions of Regulations, Part 541 Defining the Terms "Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman" (March 1958) (hereinafter the "Kantor Report") (excerpts from these reports appear in the JA at 20-42); 19 C.F.R. § 1321 (1954). Extensive

testimony was taken at each set of hearings, including testimony concerning the salary test.[5] The reports of all three Presiding Officers discuss the salary test and affirm that test as an element of the definition of the exempt categories of employees.

Beginning in 1985, after the FLSA was extended to protect public employees, the DOL again solicited comments on the exemptions. *See* 50 Fed. Reg. 47696 (1985). In 1991, the Department published a notice of proposed rulemaking revising the application of the salary basis test in the public sector. *See* 56 Fed. Reg. 45828 (1991). The Department received 398 comments on the proposal. 57 Fed. Reg. 37670 (1992). After due consideration, the DOL reaffirmed the application of the salary test in the public sector, but relieved some public employers of the obligation to comply with one element of the test. Public employers that have "pay systems established by statute, ordinance, or regulation, or by a policy or practice established pursuant to principles of public accountability" which require that employees' accumulated leave be docked for absences of less than one day or that employees' pay be docked if they lack sufficient leave, are not, as a consequence, precluded from treating their employees as exempt. 29 U.S.C. § 541.5d.

At the same time, however, the DOL emphasized that "[a]ll other aspects of the salary test were left unchanged for the public sector." 57 Fed. Reg. 37671 (1992). The DOL explained, "Sufficient justification has not been shown in the comments to warrant eliminating altogether the 'salary basis' requirement or making it inapplicable to public sector employees paid above some minimum 'upset' salary level." 57 Fed. Reg. 37671 (1992). One element of the definition of payment on a salary basis that the DOL expressly left in effect in the public sector is the

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[5] In 1940, 165 witnesses testified; 295 in 1949; and an unreported number of "[r]epresentatives of industry and labor organizations and other interested persons" in 1958. *See* Stein Report at 2 n.4; Weiss Report at 97-100; Kantor Report at 2.

requirement that salaried employees not be subject to suspension for less than a week for reasons other then violations of safety rules of major significance. *See* 29 C.F.R. § 541.118(a)(5).[6]

In sum, on five occasions over the course of over 50 years, after the most thorough deliberation, the DOL has affirmed the application of the salary basis test, including the disciplinary suspension element of the test, to determine if employees in both the private and public sectors should be excluded from the protections of the FLSA.

Not surprisingly, then, the salary basis test is well suited to its statutory function of differentiating exempt from nonexempt workers. This is true for three distinct reasons.

1. The other basic test for "executive, administrative, or professional" employees—the duties test—is, in many instances, a complex one to apply to the myriad of factual situations presented by the real world of work. The DOL has found, however, that there is almost a one-to-one correspondence between the employees who are determined, after complex fact finding, to be performing executive, professional or administrative duties and employees who are paid on a salary basis. To put this another way, only in the rarest case is a duties test exempt employee paid on a non-salary basis. After the second set of hearings concerning the exemption regulations, the Presid-

[6] The DOL considered and rejected comments critical of this element of the salary basis test on the ground that

> the comments failed to demonstrate that public employers are significantly more restricted in the availability of options with respect to employee discipline than private employers. Although public employee terminations may require compliance with procedures designed to protect employee rights, termination for disciplinary reasons is not generally unavailable. In addition, other remedies for disciplinary infractions, such as official reprimands, demotions, and reassignments or restriction of duties, are generally available and used in the public sector.

57 Fed.Reg. 37674 (1992), PA 210a.

ing Officer explained, "The evidence at the hearing showed clearly that bona fide executive, administrative, and professional employees are almost universally paid on a salary or fee basis. . . . [A]n hourly rate . . . may therefore be rejected as inconsistent with true executive, administrative or professional status." Weiss Report at 24, JA at 36-37.

By the same token, the DOL has found that employees who perform the duties of administrative, professional and executive employees are rarely subject to disciplinary suspension. The Presiding Officer at the 1949 hearings considered "[t]he practice of disciplining bona fide executive, administrative, and professional employees by making deductions from their salaries," and found that "[s]uch deductions are rarely made today. The disciplining of such employees in the rare instances where it is needed is usually accomplished in other ways than by deductions from salary." Weiss Report at 25, JA at 39.

Since salary status is thus a proxy for performing executive, professional or administrative duties and since the salary test is simple and straightforward in application, it functions as a valuable screen to sort out nonexempt employees without requiring application of the duties test. The salary test makes it easier for employers to classify their employees and for employees to understand their rights. The salary test also makes enforcement of the Act less burdensome. After the 1949 hearings, the DOL's Presiding Officer clearly set forth the value of the salary test as a screening device:

> The experience of the Divisions since 1940 supports the soundness of the inclusion of the salary criteria in the regulations. The testimony at the hearing of many witnesses representing both employers and employees supported the experience of the Divisions with respect to the usefulness and propriety of a salary test for exemption. In this long experience, the salary tests . . . have amply proved their effectiveness in preventing the misclassification by employers of obviously nonexempt employees, thus tending to re-

> duce litigation. They have simplified enforcement by providing a ready method of screening out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary. The salary requirements also have furnished a practical guide to the inspector as well as to employers and employees in borderline cases. In an overwhelming majority of cases, it has been found by careful inspection that personnel who did not meet the salary requirements would also not qualify under other sections of the regulations. . . . In the years of experience in administering the regulations, the Divisions have found no satisfactory substitute for the salary test.

Weiss Report at 8. The final of the DOL reports on the exemptions issued in 1958 similarly found:

> Essentially, the salary tests are guides to assist in distinguishing bona fide executive, administrative, and professional employees from those who were not intended by the Congress to come within these categories. They furnish a practical guide to the investigator as well as to employers and employees . . . and simplify enforcement by providing a ready method of screening out the obviously nonexempt employees. Employees who do not meet the salary test are generally also found not to meet the other requirements of the regulations.

Kantor Report at 3, JA at 42.

The salary test creates a bright line between exempt and nonexempt employees. Its outcome rests on a set of objective facts. The investigator need only ask whether an employee is paid more than the minimum and whether the employee's pay is subject to reduction for impermissible reasons. In contrast, the outcome of the duties test rests on a review of all the tasks actually performed by the employee and the percentage of time spent on each task. *See, e.g.*, 29 C.F.R. § 541.2 (defining duties of administrative employees). Predicting the outcome of the duties test and litigating under the duties test are both

significantly more difficult than application of the salary test. Thus the salary test is of substantial benefit to employers, employees, litigants, the DOL, and the courts. As the Presiding Officer concluded after the 1949 hearings, "Application of the regulations without a salary test would prove difficult for both management and labor and would increase enormously the difficulties of administration." Weiss Report at 9.

2. This correspondence between salaried status and exempt duties is not a mere happenstance. Rather, the definitions of the duties of all three categories of exempt employees include the consistent exercise of discretion. 29 C.F.R. § 541.1(d), .2(b), 3(b). Employees who exercise discretion in their work ordinarily also have discretion concerning when they do their work and the number of hours they need to perform the work. Exempt employees manage themselves and others, they are not the managed.

The independent logic of the salary test becomes apparent if one asks why professional, executive and administrative employees are excluded from the protections of the FLSA. Congress did not exclude these categories of employees simply because they tend to be relatively highly paid. This could easily have been done by basing exemption on pay rates. Nor did Congress exclude all nonmanual workers. This could also readily have been done directly.[7] Instead of excluding highly paid employees or all nonmanual workers, Congress exempted three distinct categories of employees. What do these three types of employees have in common? The answer is they generally control their own work time. They are compensated

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[7] In his 1940 Report, the DOL's Presiding Officer persuasively rejected the argument that Congress intended to exempt all "white collar workers." Stein Report at 6-7, JA 29. "Under the contrary opinion the specific statutory exemptions for named groups . . . would not be needed. . . . Surely if Congress had meant to exempt all white collar workers, it would have adopted far more general terms than those actually found in section 13(a)(1) of the Act." *Id.*

not for the number of hours they work but based on the "general value of the services performed." *Abshire v. County of Kern*, 908 F.2d 483, 486 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991). As the District of Columbia Circuit observed, "payment on a salary basis is thought to identify executive, administrative, and professional personnel precisely because it indicates employees who are given discretion in managing their time and their activities." *Kinney v. District of Columbia*, 994 F.2d 6, 11 (D.C.Cir. 1993). See also *Balkowan v. Department of Transportation*, 84 F.3d 656, 662 (3rd Cir.), *reh'g granted, vacated on other grounds*, 3 W.HCases 2d (BNA) 672 (3rd Cir. 1996). As the DOL explained just four years after it adopted the salary test, "it is well recognized that bona fide executive, administrative, and professional employees are normally allowed some latitude with regard to the time spent at work." DOL, Wage and Hour Release No. A-9 (Aug. 24, 1944), reprinted in *Wage and Hour Manual (BNA)* 719 (Cum.Ed. 1944-45).

Being paid on a salary basis is thus more than simply a proxy for performing administrative, professional, or executive duties. It is the essence of why these three categories of employees are excluded from coverage. It makes sense to exclude employees who are paid on a salary basis from the overtime provisions of the Act because they control their own time and are, therefore, not subject to the harms Congress aimed to remedy by discouraging long hours.

The disciplinary suspensions at issue here clearly mark employees who do not control their own work time. If employees may be suspended without pay for one or two days, it is clear that they are compensated for the number of hours they work and not for the "general value of the service performed." As the Seventh Circuit recognized, "If an employer measures out discipline in the form of fractions of a weekly salary, the implication is that the employee is really being paid on an hourly basis." *Mueller v. Reich*, 54 F.3d 438, 443 (7th Cir. 1995).

A comparison of young accountants and skilled steelworkers is illustrative. Accountants may work over 40 hours per week, but they choose when to come to work and can take a break during the afternoon to attend to personal business. Steelworkers may work no more hours in the week and may even be paid more than the young accountants, but because steelworkers do not control their own time (they cannot come and go as they choose), their long hours are more oppressive and were the target of the FLSA's overtime provisions. The salary basis element of the salary test is thus a sensible means of determining whether employees are excluded from the protection of the Act's overtime provision.

3. Finally, the salary test serves to determine whether employees are in a sufficiently strong position to be able to protect their interests in the absence of statutory protection. According to the Presiding Officer at the 1940 hearings, the terms used to define the exemptions "impl[y] a certain prestige, status and importance." Stein Report at 19. Because employees who qualify for exemptions are denied the protections of the Act, "[i]t must be assumed that they enjoy compensatory privileges and this assumption will clearly fail if they are not paid a [substantial] salary." *Id.* "[T]he salary test" he concluded, is "of major importance in retaining the benefits of the act for a group of employees . . . who frequently have enjoyed no compensatory advantages." *Id.*, at 42. One of those "compensatory advantages" or "privileges" is freedom from disciplinary suspensions for all reasons except violation of safety rules of major significance.

The salary basis test thus not only serves to distinguish between employees who perform the duties of administrative, professional or executive employees and those who do not, but also between those who need the protections of the overtime provisions and those who do not.

Since the DOL promulgated the salary test in 1940, Congress has extended the coverage of the Act numerous times, including into the public sector in 1966, 1974, and 1985. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 533 (1985); Pub.L. 99-150, 99 Stat. 787 (Nov. 11, 1985).[8] When an agency has a "longstanding interpretation" of a statute and Congress extends or re-enacts the statute "without pertinent change," Congress' failure to revise or repeal the agency's interpretation is "persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Aerospace Co., Div. of Textron*, 416 U.S. 267, 275 (1974). Indeed, in this instance, Congress has twice revised the salary test in minor respects since the FLSA was extended to the public sector. *See* Pub.L.No. 101-583, § 2, 104 Stat. 2871 (Nov. 15, 1990) (amending test as applied to computer programmers); Pub.L.No. 103-3, § 102(c), 107 Stat. 6 (Feb. 5, 1993) (amending test as it relates to leave taken under the Family and Medical Leave Act). And,

> Where an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.

North Haven Bd. of Ed. v. Bell, 456 U.S. 512, 535 (1982).

[8] The "particular needs and circumstances" of public employers were "carefully weighed and fairly accommodated" in the 1985 amendments to the Act. House Rep. No. 331, 99th Cong., 1st Sess. 17 (1985). The amendments tailored the law to the public sector, but did not in any way alter the definitions of the exemptions in the public sector. *See* Public Law 99-150, 99 Stat. 787 (1985). Public employers, like the respondent, were accommodated by allowing them (1) to require that law enforcement personnel work up to 171 hours over a period of 28 days without being obligated to pay premium overtime compensation, *see* 29 U.S.C. § 207(k); 29 C.F.R. § 553.201; and (2) to substitute compensatory time off for cash overtime compensation of their employees, *see* 29 U.S.C. § 207(o).

The salary basis test thus rests on the strongest statutory footing.

III. THE EMPLOYER DID NOT CARRY ITS BURDEN OF PROVING PLAINTIFFS WERE PAID ON A SALARY BASIS.

On the undisputed facts, as a matter of law, the plaintiff-employees here were not paid on a salary basis—and that is true whether the governing DOL regulation is, in accord with the dominant view, read literally or whether it is read under the gloss suggested by the United States in its brief in opposition in this case.[9]

In evaluating whether the employer carried its burden of proof, this Court can be guided by its own clear jurisprudence affirming the weight of that burden. When Congress enacted the Fair Labor Standards Act in 1938, it intended to create "minimum standards of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). In a competitive economy, such minimum standards can only be effectively enforced if they are not subject to broad exceptions that create constant pressure on employers to evade the minimum standards. That is why this Court recognized that "breadth of coverage" is "vital to [the Act's] mission." *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950). The Act's "scope was stated in terms of substantial universality." *Id.* "[W]ithin the tests of coverage fashioned by Congress, the Act has been construed lib-

[9] While not in dispute, some of the relevant facts must be found in the record, because the district court made no findings with regard to the disciplinary suspension issue. That court discussed the salary basis test only in its denial of plaintiff's motion for summary judgment. PA 71a-73a. But the trial court did not discuss the disciplinary suspension element of the test. Moreover, at the time the motion for summary judgment was denied, there were only 15 plaintiffs. Before trial, an additional 274 plaintiffs opted into the action pursuant to 29 U.S.C. § 216(b). After trial, the district court entered judgment in favor of the employer, but wholly failed to discuss the salary basis test in its opinion. PA 36a-68a.

erally to apply to the furthest reaches consistent with congressional direction." *Mitchell v. Lublin, McGaughy & Ass.*, 358 U.S. 207, 211 (1959). Correspondingly, this Court has repeatedly held that the statutory exemptions in the FLSA should be "narrowly construed." *Michael v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959). Employers bear a heavy burden of proving that employees fall "plainly and unmistakably within the [exemptions'] terms and spirit." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

The employer failed to carry its burden of proving that it satisfied all elements of the salary basis test because the plaintiffs were "subject to" disciplinary suspensions not consistent with 29 C.F.R. § 541.118(a)(5).

A. The Employer's Express Policy Rendered Plaintiffs "Subject to" Disciplinary Suspension.

The employer's express policy clearly stated that plaintiff-employees were "subject to" suspension without pay for short periods for a variety of offenses not limited to violations of safety rules of major significance. PA 107a-113a, 143a-149a. And, the plain language of the governing DOL salary basis regulation makes clear that employees are *not* paid on a salary basis if their weekly salaries are "subject to reduction because of variations in the quality or quantity of the work performed." 29 C.F.R. § 118(a).

As the Seventh Circuit has recognized, " '[s]ubject to reduction' does not mean that a reduction was actually made. The plain meaning of the language suggests that it is enough that a reduction could have been made for an impermissible reason." *Klein v. Rush-Presbyterian-St. Luke's Medical Center*, 990 F.2d 279, 286 (7th Cir. 1993). This is the construction of a majority of the courts of appeals that have addressed the issue. *See Yourman v. Dinkins*, 84 F.3d 655 (2nd Cir. 1996); *Balgowan*, 84 F.3d at 662; *Carpenters v. Denver*, 82 F.3d 353, 359

(10th Cir. 1996); *Bankston v. Illinois*, 60 F.3d 1249, 1253 (7th Cir. 1995); *Hurley v. Oregon*, 27 F.3d 392, 395 n.7 (9th Cir. 1994); *Michigan Ass'n of Gov't Employees v. Department of Corrections*, 992 F.2d 82, 86 (6th Cir. 1993); *Klein*, 990 F.2d at 286; *Martin v. Malcolm Pirnie, Inc.*, 949 F.2d 611, 615, 617 (2nd Cir. 1991), *cert. denied*, 506 U.S. 905 (1992); *Abshire v. County of Kern*, 908 F.2d at 487.

In this instance, the literal reading of the regulation is also the most rational reading for three reasons. First, if, as in this case, the employer has made clear that employees are subject to short suspensions for misconduct other than violation of safety rules of major significance, then the employer has classified the employees in a manner that is inconsistent with the status of administrative, professional and executive employees. That is true whether or not deductions have actually been made. For such deductions will actually occur only if there is misconduct by the employee. Whether an employee or his or her coworker has engaged in misconduct surely is not relevant to the questions of whether they should be covered by the FLSA. The Third Circuit aptly observed that "it would be rather arbitrary to hold that whether an employer qualifies for . . . exemption shall be determined by the employees' collective good behavior." *Balgowan*, 84 F.3d at 663. As the Eleventh Circuit has added, "Such an interpretation of the regulations would lead to an irrational result, because it would favor employees who are disciplined for breaking the rules—and thus become eligible for overtime—over employees who respect those same rules." *Avery v. Talladega*, 24 F.3d 1337, 1342 (11th Cir. 1994). It is the act of classification that speaks to the status of the employees, not the use of the sanctions that the classification permits.[10]

[10] The D.C. Circuit recognized this point when it stated, "The regulation is intended, after all, to divide employees into classes based on their status, not to identify employees deserving compensation for individual losses." *Kinney*, 994 F.2d at 11.

Second, it is important to recognize that the "subject to" language prefaces the entire section defining what it means to be paid on a salary basis not just the disciplinary docking subsection. Employees must receive a predetermined amount that is not "subject to reduction because of variations in the . . . quantity of work performed." 29 C.F.R. § 541.118(a). While the DOL has created a limited exception to the salary basis test for public employers who dock employees pay for short absences because they are required to do so by principles of public accountability, 29 CF.R. § 541.5d, the entire salary basis test still applies in the private sector. Because the "subject to" language appears in the statement of the rule in subsection (a), it cannot be construed to mean one thing with respect to deductions for short absences and another thing with respect to disciplinary suspensions.

Employees do not control their own time, and thus should be protected by the Act's overtime provisions, if they are subject to being docked for short absences whether or not they are ever actually docked. If employees are subject to being docked for short absences, they will not leave work to take a child to the doctor or to attend to other personal business.[11] They cannot come and go as they choose and thus are likely to find long hours more oppressive than employees who are not subject to being docked for short absences. Thus, employees who are subject to being docked, not merely those who are actually docked, need the protection of the FLSA's overtime provisions.

Finally, there is no coherent alternative to a rule that renders employees nonexempt if they are subject to reduc-

[11] The Sixth Circuit, recognized this in *Michigan Ass'n of Gov. Emp.*, "Employees subject to reduction in pay will, of course, attempt to avoid those reductions by juggling schedules and sacrificing non-work opportunities. Simply because a reduction in pay has never been applied does not mean that the employee has not been affected by the policy subjecting the employee to pay reductions." 992 F.2d at 86.

tions in their salary. Neither the statute nor the regulation gives this Court any guidance concerning what amount of actual reduction would render an employee "subject to reduction" and thus nonexempt. A host of questions would be raised by the rejection of the literal terms of the regulation: would an employee gain the protection of the FLSA only for those weeks in which he or she was actually docked: would other employees occupying the same classification also gain protection even if they were not actually docked? There is no coherent answer to these questions because it does not make sense to require actual docking as a prerequisite to extending the protection of the Act.

While several lower courts, including the lower courts in this case, have held that employers can avail themselves of the exemptions even if their employees' salaries are subject to docking, so long as there has been no actual docking, none of these courts has even proposed a standard that can be used to determine what degree of docking will deprive employers of the exemptions, for what time periods, and as to which employees. *See* PA at 9a-10a; *McDonnell v. Omaha*, 999 F.2d 293, 297 (8th Cir. 1993), *cert. denied*, 510 U.S. 1163 (1994); *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

The express policy rendering plaintiffs "subject to" disciplinary suspension prevented the employer from carrying its burden of proving plaintiffs were paid on a salary basis.[12]

[12] The prevailing construction of the salary basis regulation supported here imposes little burden on employers. If employers rarely, if ever, resort to docking the pay of otherwise exempt employees, they can readily amend their personnel policies to square them with their practices. An array of disciplinary measures can be substituted for short suspensions. Employers that wish to avail themselves of the exemptions will neither be denied the means of disciplining employees nor prevented from engaging in progressive discipline as a result.

B. The Plaintiffs Were "Subject to" Disciplinary Suspension "as a Practical Matter."

The United States in its brief *amicus curiae* on the *certiorari* petition, proposes a novel construction of the salary basis regulation pursuant to which "salary status is lost . . . only when employees are 'subject to' such a disciplinary suspension *as a practical matter*." U.S. Br. at 10. The government explains, "the employer has the burden of proving that the employees are paid on a salary basis, *e.g.*, by showing that there have been only isolated instances in which disciplinary suspensions have occurred, or that suspensions have occurred only in unusual circumstances." *Id.* Because the employer in this case did not carry even this burden, this Court need not and should not choose between the literal constrution of the regulation and the government's proposed construction. Such a choice is not only unnecessary to decide this case, but premature before the DOL adopts the proposed construction through appropriate administrative procedures.[13]

The employer in this case failed to prove that plaintiffs were not subject to disciplinary suspension as a practical matter. There is no dispute that the employer had a written policy providing for such suspension. The employer presented no evidence that it has revised its policy to make clear that plaintiff-employees could not be suspended for less than a pay period for reasons other than safety violations of major significance. In fact, while the litigation was pending, the employer revised its policy to make termination the sole penalty for violation of its residency requirement, while leaving plaintiff-employees subject to suspension for less than a pay period for all other types of infractions. JA 87; PA 218a.[14] Equally to

[13] The DOL has recently published a notice of its intention to review the regulation at issue. *See* 61 Fed.Reg. 23238 (1996), JA 43.

[14] This revision was obviously motivated by the inconsistency of merely suspending an employee for an ongoing violation of the

the point, in the face of its clear policy and the limited reason of that policy, the employer presented no witness to testify that it would not in the future suspend plaintiff-employees for less than a pay period of reasons other than violation of safety rules of major significance.

The employer, with full access to the personnel files of all its employees, presented no witness to testify that it had not suspended any plaintiff for less than a pay period for reasons other than violation of safety rules of major significance. In fact, the employer's Chief of Police, who was designated by the employer pursuant to Fed. R. Civ. P. 30(b)(6) to testify about its personnel policies, testified that a sergeant "could be—he could be suspended . . ., say, maybe one day suspension, two day suspension." JA 60 (testimony of Chief of Police Robert Scheetz). *See also* JA 53. Several other management and supervisory witnesses testified that plaintiffs could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See* JA 53 (testimony of Rosalie Corelyou, defendant's 30(b)(6) designee on compensation administration, that "they may say your punishment is two days plus the day you were not here"); 63 (testimony of Larry Pattison, defendant's 30(b)(6) designee on FLSA exemptions, that "the discipline could include suspension for a particular number of days, which would be loss of pay for that day"); 76 (testimony of Lt. James Scago that "[s]ure, but it could be longer than a day or two or it could be less"). Several plaintiffs testified that they could be suspended for less than a pay period for reasons other than violation of safety rules of major significance. *See, e.g.*, JA 85, 86; PA 217a.

One of the 16 plaintiffs who testified was suspended for less than a pay period for violation of the residency requirement. JA 87; PA 217a.[15] While the suspension re-

residency requirement rather than a desire to insure that employees were paid on a salary basis.

[15] Because the case was bifurcated and the liability phase involved the testimony of only 16 representative plaintiffs, jointly chosen

sulted from the reduction of an initial proposal to remove the plaintiff, this is not an unusual circumstance, but rather a common occurrence resulting from both formal grievance procedures and informal protests and compromises between employers and employees. In addition, another plaintiff testified that he knew of other sergeants who had been suspended. JA 86.

Even courts, such as the Eleventh Circuit, that have held that actual deductions are necessary to deprive an employer of the benefit of the exemptions, hold that the suspension of one employee prevents the employer from claiming the exemptions for all employees in the same classification. *See Avery*, 24 F.3d at 1342. The DOL has endorsed this conclusion.[16]

Finally, there is other evidence in the record suggesting that plaintiffs were not paid on a salary basis. Plaintiffs' time and attendance records were kept on an hourly basis and they were subject to strict reporting and attendance requirements. JA 60, 65.[17] Some plaintiffs earned additional cash compensation or compensatory time off for extra hours worked and some received a shift differential on an hourly basis. JA 48, 73, 76, 79, 81, 82, 15-17, 47, 51.[18]

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by the parties, their supervisors, and Fed.R.Civ.P. 30(b)(6) designees, the testimony of the 16 plaintiffs should be understood to be representative of the experience of all 289 plaintiffs.

[16] In 1992, the DOL was asked to "[c]larify that all improper deductions result in loss of the exemption only for the particular employee docked and only in the workweek of the improper deductions," 57 Fed. Reg. 37666 (1992), PA 211a. The DOL classified the "suggested change" as "a significant departure from long-standing policy that is not substantiated by comment." *Id.*

[17] Several lower courts have held that rigid, hourly attendance requirements are inconsistent with salaried status. *See, e.g., Abshire*, 908 F.2d at 486 (exempt employees "are thought not to punch a time clock").

[18] Several lower courts have held that additional compensation for extra hours worked is inconsistent with salaried status. *See*

Under any plausible construction of the salary basis test, the employer did not carry its burden of proof in this case.

IV. THE EMPLOYER CANNOT GO THROUGH THE WINDOW OF CORRECTION.

There is a narrow "window of correction" available to employers who have inadvertently and in isolated instances acted inconsistently with the salary basis test. 29 C.F.R. § 118(a)(6) provides that "where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future." [19]

It is obvious that the employer here cannot pass through the window of correction because it has not complied with the express terms of the regulation. The employer has not

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Abshire, 908 F.2d at 486; *Brock v. Claridge Hotel and Casino*, 846 F.2d 180, 184-85 (3d Cir. 1988). 29 C.F.R. § 541.118(b) provides that additional compensation over a minimum salary is not inconsistent with payment on a salary basis, but the examples given in the subsection are commissions on sales, a percentage of sales, and payment for extra days or shifts worked. The subsection thus implies that extra compensation for extra hours worked is inconsistent with payment on a salary basis.

[19] The entire subsection provides:

> The effect of making a deduction which is not permitted under these interpretations will depend upon the facts in the particular case. Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

reimbursed even the one employee who was shown to have been docked. Moreover, the employer has not revised its discipline policy to exclude allegedly exempt classifications or in any other way promised not to dock such employees in the future.

Even if the employer were to now reimburse all employees who have been suspended and promise not to suspend allegedly exempt employees in the future, the window of correction should be deemed closed once litigation is initiated. A contrary rule would encourage employers to ignore the salary test, deny overtime compensation to hourly employees, wait to be sued, and then merely reimburse those employees who sue for any reductions they suffered. Such a result would deprive employees who have been treated as hourly employees of the remedies specifically provided for in the Act: recovery of "unpaid overtime compensation . . . and . . . an additional equal amount as liquidated damages." 29 U.S.C. § 216(b).

Finally, the window of correction should not be opened for employers who have made deliberate rather than inadvertent deductions. While the literal terms of the subsection appear to allow employers to utilize the window of correction where deductions are inadvertent *or* made for reasons other than lack of work, the majority of courts of appeal have held that the subsection should be read in the conjunctive rather than the disjunctive. *See Klein*, 990 F.2d at 287; *Martin*, 949 F.2d at 616-17; *Abshire*, 908 F.2d at 489.[20] To allow an employer to expressly and

[20] In this case, the Court of Appeals makes contradictory statements on this issue. On the one hand, the court below states that "[b]ecause the regulation is written in the disjunctive, it is not material that the deduction from Sergeant Guzy's pay was not inadvertent so long as it was made for reasons other than lack of work," PA 9a-10a n.7, but, on the other hand, that court states, that "[t]he 'window of correction' is not available if the employer has a settled policy of making improper deductions from compensation." PA 10a.

deliberately treat employees as hourly employees, to require that those employees work overtime, to deny those employees overtime compensation required by the FLSA and then allow the employer to avoid any obligation to pay overtime compensation if it merely reimburses the employees for any reductions in their salaries, would be to gut the effectiveness of the salary basis test. Such an outcome would undermine the statutory objective of discouraging long hours among hourly employees and deny employees who have been treated as hourly and not paid in accordance with the Act an adequate remedy.

Because the employer in this case has not reimbursed employees for reductions, has not promised to comply in the future, did not correct its practice prior to initiation of litigation, and made reductions pursuant to an express policy, the employer cannot pass through the window of correction.

CONCLUSION

For the above-stated reasons, this Court should reverse the decision below with directions to enter judgment in favor of the plaintiffs.

Respectfully submitted,

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